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## *Implications of Recent Developments in Ireland for the Status of the Embryo*

SHEELAGH McGUINNESS and SORCHA UÍ CHONNACHTAIGH

One of the most significant developments in the area of reproductive health in Ireland is the *Roche v. Roche* [2009] case.<sup>1</sup> The case concerned a woman who wished to implant cryopreserved embryos made with a former partner, against the partner's wishes. Of particular interest are questions about the status of the embryo: in Ireland the life of "the unborn" is constitutionally protected.<sup>2</sup> Therefore the courts in *Roche* had to decide whether embryos were "unborn" within the meaning of the Irish Constitution. Article 40.3.3 of the Constitution states:

The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right.

The absence of any clarificatory legislation on abortion<sup>3</sup> and the lack of regulation in the area of assisted human reproduction (AHR) created room for broad interpretation of the constitutional provision, which is seen by many, including most of the judges in the case, as a ban on abortion.<sup>4</sup> Mary Roche (MR), the applicant in *Roche*, claimed not only that her estranged husband could not refuse his consent to implantation of the embryos (and responsibility for any resulting children) but that the constitution conferred a right to life on the frozen embryos, in which case the husband's consent would have been irrelevant in many respects. If the courts had found that Article 40.3.3 did apply to in vitro embryos, thus giving them a right to life, there would have been serious implications for the legal permissibility of many AHR techniques and practices, something that was acknowledged by Gerard Hogan, Senior Counsel for MR.<sup>5</sup> The Supreme Court's interpretation of "unborn" would also have had broader implications for abortion, post-coital (emergency) contraception, and embryo research.

In this paper we examine the ruling in *Roche*, which is a landmark decision in the Irish bioethical landscape. In Ireland, the centrality of the Constitution means that bioethical issues are often considered within the constitutional law paradigm. We do not address the substance of the consent arguments in this case; rather we focus on the constitutional law questions raised in *Roche* and the particularities of the Irish context. We argue that the Supreme Court's interpretation of Article 40.3.3 relies on a distinction between moral and legal status and that in Ireland "legal" status depends on implantation of the embryo in the "maternal organism." The paper concludes with some thoughts on the possible implications of the decision in *Roche* for bioethics in Ireland.

## **The Case**

The plaintiff and defendant married in 1992. In 2001, they were referred for infertility treatment at the Sims Clinic in Rathgar, Dublin.<sup>6</sup> During the course of their visit to the clinic the plaintiff signed a form entitled "Consent to Treatment Involving Egg Retrieval." This recorded her consent to the removal of eggs and the mixing of these eggs with the defendant's sperm. Similarly, the defendant signed a form entitled "Husband's Consent." Here he acknowledged that he was the plaintiff's husband and consented to "the course of treatment outlined above," and that he was the legal father of any resulting children from the treatment. They both signed a form entitled "Consent to Embryo Freezing." In signing this, they agreed to the cryopreservation of their embryos and agreed to take ongoing responsibility for them. Finally the defendant signed a form entitled "Consent to Embryo Transfer" giving his consent to the placing of three embryos in the plaintiff's uterus. In the course of treatment, six embryos were created, three of which were implanted and three of which were frozen. The treatment was successful and the plaintiff gave birth to a girl in October 2002. However, during the pregnancy, the marital relationship broke down, attempts at reconciliation failed, and the couple separated but remained legally married.

A dispute arose over the remaining frozen embryos. The plaintiff wished to have them transferred into her uterus for the purposes of achieving a pregnancy. The defendant, who did not wish for this to happen, said that his consent did not cover the situation that had arisen and that it would be unreasonable to expect him to father a child in such circumstances. The plaintiff contested that the defendant's earlier consent covered this situation. She initiated proceedings to have the embryos returned to her for implantation. In her statement of claim, she also argued that, in accordance with article 40.3.3, she was entitled to vindicate the right to life of the three embryos.

The case was first heard by Mr. Justice McGovern, in the High Court, who ruled that the first issue to be decided was the civil law issue of consent. He said that this was separate from the public law issue of the embryos' "right to life," and thus delivered two rulings. The first was delivered in July 2006 and considered whether the consent given by the defendant covered the circumstances that had arisen. McGovern J. criticized the clinic's consent procedures. He said the forms were vague and unclear. He also stated that the issue of what would happen to the embryos if the circumstances of the couple changed, either through death or separation, should have been raised.<sup>7</sup> He ruled that there was no evidence that the defendant had given his explicit consent to the implantation of the remaining three embryos. He further found that there was no implied consent on the defendant's part and that he had not "entered into an agreement which requires him to give his consent to the implantation of the three frozen embryos in the plaintiff's uterus."<sup>8</sup> In his second ruling, McGovern J. addressed the question of whether for the purposes of Article 40.3.3 of the Irish Constitution the embryos could be regarded as unborn. If they were regarded as unborn, then the plaintiff could bring a claim to the courts on their behalf, to vindicate their right to life. The plaintiff also brought a claim under Article 41 of the Constitution, Respect for Private and Family Life. This claim also depended on whether the embryos could be considered unborn for the purposes of the Constitution. McGovern J. rejected the plaintiff's claim that in vitro embryos had a constitutional right to life, and so these subsequent claims failed.

The case was appealed on 14 grounds to the Supreme Court and heard by Chief Justice Murray and Denham, Hardiman, Geoghegan, and Fennelly, JJ. We identify a number of core themes within the judgments that we discuss here with reference to the relevant aspects of the broader policy context in Ireland. This case highlights issues that arise when courts are faced with the ambiguous nature of the embryo's status and the uncertainty many feel about distinguishing questions of when life begins to matter morally and when life acquires the protection of the law.

A theme running through all the judgments is the difficulty resulting from varying accounts given in evidence of what the embryo is and whether it has moral status, human features, and so forth. The judges highlighted the difficulty for a court when deciding questions of when life begins to matter morally. Murray CJ. and Denham J. rejected the notion that the constitutional provision needs to concern itself with questions of when life begins. Rather they focused on defining the provision as being concerned with life prior to birth. Murray CJ. stated:

The status of the embryo, that is to say its moral status, and specifically the issue as to when human life begins, continues to be debated and discussed as part of a virtually world wide discourse . . . [t]he many facets of the various sides to that debate, and there are cogent arguments from every perspective, is manifest from the evidence given by the expert witnesses in the High Court.

. . .

The moral status of embryos and the respect or protection which society may feel they are owed is a different issue to the question posed, as to when life begins, and I do not propose to comment on it further for the purposes of this judgment.

The Court was keen to clarify the distinction between moral and legal questions. It held that it is not for the Court to consider when life begins but rather when it starts to be protected by law, that is, to focus on clarifying the legal status of the embryo while acknowledging that this may or may not align with moral status. The question is whether or not the frozen embryos are protected by law.<sup>9</sup> Brazier suggests that this approach to decisionmaking is evidenced in many medico-legal cases; where possible, "judges elegantly sidestep as many knotty moral problems as they can."<sup>10</sup> Of course, such an approach itself assumes a certain moral position, that there is a difference between questions of law and questions of morality, a point that has been criticized by those who emphasize the natural law foundations of the Irish Constitution.<sup>11</sup> Nevertheless, the Courts instead define their task, in the absence of legislation, as a policy question.

### **Background to Article 40.3.3**

At this point some background to the contested provision of the Constitution may be helpful. In 1983 the government held a referendum that led to the insertion of Article 40.3.3 into the Irish Constitution. The Article was the eighth amendment to the Irish Constitution and in 1983 abortion was prohibited by The Offences against the Person Act 1861.<sup>12</sup> The introduction in the United Kingdom of the Abortion Act 1967 and the U.S. case of *Roe v. Wade* created a fear among some groups that similar liberalization of abortion law in Ireland might occur.<sup>13</sup> Many commentators therefore suggest that 40.3.3 is best understood as a strengthening of

the prohibition on abortion, and it is this position that the majority of the judges in *Roche* took.

One of the main cases relied on was the seminal ruling in *The Attorney General v. X & Ors (X)*.<sup>14</sup> This case took place in 1992 and is the leading authority on the interpretation of Article 40.3.3. It concerned a young girl, X, who was pregnant as a result of rape.<sup>15</sup> X's parents wished to take her abroad for an abortion but sought advice from the police about whether tissue from the fetus could be used as evidence against the alleged rapist who was known to the family. The police referred the case to the Attorney General, and the question arose as to whether X could be prevented from traveling to England for the purposes of having an abortion given the constitutional protection afforded to the unborn. The case relied explicitly on the relationship between the unborn and the pregnant woman, which is evident from the following quotations:

The creation of a new life, involving as it does pregnancy, birth and raising the child, necessarily involves some restriction of a mother's freedom but the alternative is the destruction of the unborn life. The termination of pregnancy is not like a visit to the doctor to cure an illness. The State must, in principle, act in accordance with the mother's duty to carry out the pregnancy and, in principle must also outlaw termination of pregnancy.<sup>16</sup>

The case also made the following pronouncement on how Article 40.3.3 should be interpreted:

Its purpose can be readily identified—it was to enshrine in the Constitution the protection of the right to life of the unborn thus precluding the legislature from an unqualified repeal of s.58 of the Act of 1861 or otherwise, in general, legalising [sic] abortion.<sup>17</sup>

This is a very narrow interpretation and essentially states that the purpose of Article 40.3.3 should only be understood as directly preventing any chance of abortion being legalized in the State.<sup>18</sup> From the above statement strength can be taken for the argument that it is through implantation that the “unborn” (the embryo) achieves protection. This is something that was recommended in 2005 by the Irish Commission on Assisted Human Reproduction, which will be discussed in more detail below. The special relationship between the pregnant woman and the fetus, according to this analysis, gives rise to fetal protection; this turns on its head the usual arguments regarding the justifiability of abortion on the grounds of respecting the physical integrity of the pregnant woman.

The connection between Article 40.3.3 and abortion led the majority of the Supreme Court to conclude that although the “unborn” could be equated with the in utero embryo, the in vitro embryo does not come within 40.3.3 for the purposes of acquiring the protection of the law. It was also argued that there is no evidence that the in vitro embryo was in the minds of the people voting in the referendum on Article 40.3.3.<sup>19</sup>

### **Lack of Regulation in Ireland**

This was not the first time the question of whether embryos were constitutionally protected by 40.3.3 was raised. When Article 40.3.3 was being drafted the Seanad, which is the upper house of the Irish Parliament, defeated a proposal that defined

the unborn as excluding “the fertilised ovum prior to the time at which such fertilised ovum becomes implanted in the wall of the uterus.”<sup>20</sup> This was overlooked by all of the judges in *Roche*. Instead they preferred a test of the minds of the people as they voted over parliamentary intention, which is discussed further later in the paper. In 2002, in the wake of the decision in *X*, there were calls to further restrict possibilities for legal abortions within the State. A further amendment to the Constitution, which would restrict access to abortion to cases where the life, as opposed to the health, of the pregnant woman was at risk was proposed.<sup>21</sup> Again during these debates the question of whether embryos should be considered to fall within the protection of 40.3.3 was considered.<sup>22</sup> More recently the Commission on Assisted Human Reproduction (CAHR) addressed this point and came to the view that the ex utero embryo is not deserving of constitutional protection.<sup>23</sup> The CAHR was established by the Minister for Health and Children amid growing public concern over the lack of regulation in the broad area of AHR in Ireland.<sup>24</sup> The Report of the CAHR in 2005 made 40 recommendations, many of which, if acted upon, may have precluded *MR* from progressing to the courts at all. The Irish Medical Council had previously prohibited registered medical practitioners from deliberately destroying embryos<sup>25</sup> but more recent editions of the Council’s ethical guidelines are not as proscriptive.<sup>26</sup> This view was also endorsed by the Irish Council for Bioethics in their 2008 report on embryonic stem cell research.<sup>27</sup> Several of the judges acknowledged and made reference to the CAHR Report and called for this area to be regulated and considered by parliament.<sup>28</sup> Many also referenced the Constitutional Review Group Report in 1996, which stated that a

definition is needed as to when the “unborn” acquires the protection of the law. Philosophers and scientists may continue to debate when human life begins but the law must define what it intends to protect.<sup>29</sup>

They further expressed serious dissatisfaction with the lack of guidance regarding the meaning of the “unborn.”

The regulatory context, more precisely the absence of any regulation or legislation in the area of AHR, generated an opportunity to test the constitutional provision that protects the right to life of the “unborn.” This absence of regulation was sharply criticized by several of the Supreme Court judges. Denham J. (s.46) pointed out that it is not for the court to make decisions about “the imponderables relating to the concept of life,” which is the remit of science, theology, and ethics. It was the Supreme Court’s responsibility to interpret the Constitution, on points of law alone.<sup>30</sup> Murray CJ. pointed out that it is the responsibility of the legislature to decide controversial issues, such as the beginning of human life:

I do not consider that it is for a court of law, faced with the most divergent if most learned views in the discourses available to it from the disciplines referred to, to pronounce on the truth of when precisely human life begins. Absent a broad consensus or understanding on that truth, it is for legislatures in the exercise of their dispositive powers to resolve such issues on the basis of policy choices.<sup>31</sup>

Hardiman J. further emphasized that it is not for the courts to adjudicate on matters concerning the beginning of life. He warned that Ireland risks becoming a default unregulated jurisdiction for controversial practices in the absence of regulation.<sup>32</sup> He criticized the patent “reluctance” of the legislature to act on its obligation to consider the admittedly complex and difficult issues raised by the in vitro embryo as to when life begins. Hardiman J. also drew attention to the call for legislation by McCarthy J. in the X case in 1992. In regard to the absence of abortion legislation, McCarthy J. stated, “[t]he failure of the Legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable.”<sup>33</sup> Geoghegan J. referred to the Report of the government-appointed CAHR in 2005 as an example of proper consideration of the issues at hand. With regard to this report, Fennelly J. stated: “It is disturbing, to use no stronger word, that some four years after publication of the Report of the Commission on Assisted Human Reproduction, no legislative proposal has even been formulated.”<sup>34</sup> The political inertia of the government on abortion and assisted reproduction was particularly vexing for the Supreme Court given the persistent calls from the High Court, civil society groups,<sup>35</sup> and government committees.<sup>36</sup>

McGovern J., in the High Court, stated that he would interpret the Constitution in accordance with its main principles but also with due regard to the intentions of the voters when Article 40.3.3 was inserted into the Constitution. He stated that constitutional principles could change over time and were not set in stone. However, he took a definite approach to understanding the intentions of the population in 1983, stating:

They are not, in my view, authority for the proposition that the word “unborn” in Article 40.3.3 should be given a different meaning to that which was understood by the people at the time when they approved the amendment, if it can be ascertained, from the historical context, what the word was understood to mean.<sup>37</sup>

McGovern J. looked to other sources in Irish law to find a way of defining the “unborn.” These included section 58 of the Civil Liability Act 1961, which states:

For the avoidance of doubt it is hereby declared that the law relating to wrongs shall apply to an unborn child for his protection in like manner as if the child were born, provided the child is *subsequently born alive* [emphasis added].<sup>38</sup>

The Act is primarily concerned with the “unborn” as it exists in utero, although it is open to the possibility that in vitro damage may lead to a resultant child bringing a successful claim. This piece of legislation has as a condition the possibility that the child subsequently be born alive. Denham J. picked up on this line of reasoning and spent much time analyzing the contingent nature of Article 40.3.3. She believed that the amendment relies on the implantation of the embryo because

[t]he unborn is considered in Article 40.3.3° in relation to the mother. The special relationship is acknowledged. Of course there is a relationship between the frozen embryos in the clinic and the mother and the father—but not the link and relationship envisaged in Article 40.3.3°. Article 40.3.3° was drafted in light of the special relationship that exists uniquely between a mother and the child she carries. It is when this

relationship exists that Article 40.3.3° applies. . . . The beginning of “life” is not the protected term, it is the unborn, the life capable of being born, which is protected. The capacity to be born, or birth, defines the right protected. This situation, the capacity to be born, arises after implantation.<sup>39</sup>

It seems uncontroversial to define “unborn” as that which has the capacity to be born but the implications of the conditions upon which that capacity relies are more divisive. Further arguments were presented to the Court that stated that where there was doubt as to the meaning of “unborn” the courts should come down on the side of life, but this is something that the Courts rejected. Some of the judges, however, stated that uncertainty may lead to the embryo being treated with special respect and that the creation of embryos gives rise to “serious moral and ethical issues which themselves impose restraints on what may or may not be done to them.”<sup>40</sup> The Court also draws from previous judgments that dealt with the definition of “the unborn” showing that they all focused on the “unborn” as an entity which can be found in utero. (This may be unsurprising given that assisted reproductive technologies have only relatively recently become available in the State.)

### Legal and Moral Status

Drawing from the arguments presented in *Roche*, this section briefly examines the distinction between the function of moral and legal status. The uncertainty surrounding the constitutional status of embryos led Murray CJ. to conclude that

[t]he courts do not, in my view, have at their disposal objective criteria to decide this as a justiciable issue. Issues are not justiciable before the courts where there is, as Brennan J. put it in his opinion in *Baker v. Carr* 369 U.S. 186 (1962), “a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion.” That is the position in which the Court in this case is placed regarding the question of when life begins. The onus rests on the Oireachtas to make the initial policy determination so as to define by law the precise point at which “the life of the unborn” begins to enjoy constitutional protection. The other alternative is an amendment to the Constitution.<sup>41</sup>

As the court acknowledged, the question of when life begins is an issue fraught with metaphysical difficulty. Our view of when life begins will be colored by our moral opinions, religious beliefs, and the society we are born into. Moral status should be based on nonarbitrary criteria and should relate to intrinsic properties.<sup>42</sup> Legal status, as a concept, is not like this. It is an externally granted property. The law defines what falls within its protection, and once something has legal protection, it has legal status. Legal status can also come in degrees and seems to have more possibilities for accommodating the symbolic values of various entities, for example, the flag. It is to this that the judges were pointing when they considered the distinction between moral accounts of when life begins and legal



accounts of when life acquires protection. We may define something's having legal status in an arbitrary fashion. Arbitrariness is not necessarily illegitimate in this context, although it may be. For instance, the decision to set the speed limit at 40 may be based on a legitimate arbitrary cutoff between 35 and 45.

However, the decision to protect the human life from birth may be considered arbitrary in a way that is not subject to moral justification. Consider the following objection to the High Court decision in *MR*:

Father Vincent Twomey, Professor Emeritus of Moral theology at St. Patrick's College, Maynooth . . . stated that the decision was based on a distinction that was without scientific basis.<sup>43</sup>

His argument is as follows:

Current scientific knowledge underwrites the equal biological status of all human pre-implantation embryos irrespective of their origin or location. The full potential of such embryos, whether produced in the laboratory or through natural conception is identical: given the opportunity, both groups will, with varying degrees of success, continue to develop in the womb.<sup>44</sup>

This argument can be drawn out on a number of points. The first of these is the normativity given by Father Twomey to the scientific description of the embryos. As Szawarski describes:

If we accept that no moral conclusion can be deduced from empirical or metaphysical statements alone, then whatever the empirical (or metaphysical) arguments brought into debate to endorse a moral position it can never be conclusive reason. It is always what C.L. Stevenson would call a "supporting reason" only.<sup>45</sup>

The fact that embryos in utero and in vitro are biologically the same does not mean that they ought to be treated the same, either morally or legally. This is because, although biologically the same, there is much to distinguish the two, for example, their relationship with their surroundings and also their capacity given their surroundings. Legally it seems quite reasonable to grant protection to in utero embryos but not to in vitro embryos. In the same way, the law protects born alive babies in a way it does not protect biologically identical in utero fetuses. This is true of the law in many jurisdictions, including Ireland, where, notwithstanding 40.3.3, the killing of the fetus in utero is not considered murder. Morally, if we take potentiality to be the basis for our respect of the embryo (and this seems to be at least part of the meaning of "unborn"), the potentiality of the two entities is not identical.<sup>46</sup> Rather it is following implantation that an embryo has the potentiality that Father Twomey describes—the embryo in utero and the uterine environment give true potentiality for life. The in vitro embryo does not in itself have the same potentiality given its less hospitable surroundings. This reasoning can be seen as underpinning the importance placed on implantation and providing a reason why, in Ireland, the embryo is reliant on an attachment to the pregnant woman for constitutional protection. Most significantly, it is at the point of implantation that the *unborn* acquires

a negative right against hostile interference; the in vitro embryo would need a positive right to be implanted.

Following the Court in *Roche*, we consider the argument that legal persons are those entities that the law defines as its subjects and differ from persons in the moral sense, even though there may be a correlation between moral arguments and legal positions adopted. There is a long-running debate between legal positivists and natural law theorists on this very question.

The function of moral status is a different question from that of the function of law. Warren suggests that moral status may function in two ways. It may imply moral minimums, that is, moral status may set a minimum standard for how we act toward each other.<sup>47</sup> Or it may imply moral ideals, that is, it may give rise to ideals in the standards of how we act toward each other. Legal status guarantees an entity certain legal protections and may not exactly correlate with moral status. An entity's legal status defines the minimum legal standards we must observe in our dealings with it. There is much disagreement over the point at which an entity with full moral status comes into existence. Some argue that moral status can be a matter of more or less; others that it is achieved at a moment in time that cannot be defined.<sup>48</sup> When there is reasonable disagreement over whether an entity like the embryo has moral status, it may be granted legal status as a matter of degree.<sup>49</sup> Given the uncertainty surrounding issues of moral status, it may be that the law simply draws lines at seemingly arbitrary points. Claims that the law suggests that these points are morally special or that they constitute bright lines on the moral spectrum are untrue and display a lack of understanding of law's purpose. There is a distinction between when something gains the law's protection and when it has moral status. One should not necessarily be understood as an offshoot of the other.<sup>50</sup> When there is disagreement over moral status, the law, in granting legal protection, is making a statement about what is an acceptable way for people to behave given this disagreement.

Finnis criticizes this approach to legal status.<sup>51</sup> However, the account of personhood that Finnis relies on is by no means uncontroversial or widely accepted. He endorses an account of personhood that is reliant on the notion of "radical" capacities.<sup>52</sup> Human embryos have the "radical" capacity for thought, self-awareness, and so forth, even if they are not yet able to exercise that capacity. According to Finnis, this sophisticated form of potentiality provides the basis upon which the law's protections should be afforded. He further states that simply being a member of a species that generally has these capacities is sufficient for moral status. He goes on to argue that pragmatism about legal status like that endorsed by *Roche* and the Warnock Committee allows the law to be misused by those in power—he uses an analogy with slavery. However, there is a problem with trying to pin legal status to an account of moral status: reasonable people will disagree over whether an entity has moral status or not. Even Finnis himself is simply providing an account of features that he believes can be justified as giving rise to moral status. Other accounts privilege different features. The *Roche* court did not ignore the question of moral status; rather, they acknowledged that there is no agreement as to whether embryos have moral status. They had to decide whether the features of the embryo gave rise to legal status notwithstanding the lack of consensus on the prior issue of moral status.<sup>53</sup>

### **Concluding Thoughts on the Implications of Roche**

By way of conclusion we wish to provide some brief thoughts on the implications of the *Roche* decision for bioethical issues in Ireland. In the wake of *Roche*, the permissibility of assisted reproductive technologies seems assured. Further, the decision in this case seems to create scope for experimentation on embryos, something that was considered impermissible prior to the case. Hardiman J. (supported by Fennelly J.) made very strong policy-directed recommendations regarding regulation (via legislation and a regulatory body) of AHR in Ireland. Whether there will be government policy on this issue remains to be seen; the controversial nature of the issues to be decided coupled with the current social problems that have resulted from the recent recession create a lack of political will on the part of government. What is clear as a result of this case is that AHR and embryonic stem cell research are both possible without the prohibition on abortion being lifted or indeed weakened. Many of the judges in this case were at pains to make clear that the prohibition on abortion as set out in 40.3.3 remained clear and would not be changed as a result of the judgment. Counterintuitively, given the legal status of abortion, the abstraction of the embryo from the uterus is seen as removing from it several layers of protection. It is quite unusual for a constitution to give such strong protection to the in utero embryo while simultaneously giving none to the in vitro embryo. The embryo is reliant on the connection to the female body to gain the protection of the law. For example, Denham J. focuses on “the equal right to life of the mother” set out in Article 40.3.3<sup>o</sup> as important for interpreting when the Article applies. The in vitro embryo does not have a special relationship with the mother of the sort included in the Article. On this basis, Denham J. held that the Article does not apply where this relationship is not relevant (s.59). In *Roche* we see that the role of the pregnant woman underpinned the constitutional protection. The embryo’s connection to the “maternal organism” gives rise to its capacity to be born,<sup>54</sup> and it is this characteristic that justifies its constitutional protection. The in vitro embryo enjoys no such protection, and thus further legislation or regulation is required to elucidate what may be done to and with it.

### **Notes**

1. *Roche v. Roche & Ors* [2009] IESC 82 (hereafter *Roche*) was the Supreme Court appeal case. The first High Court judgment was *R v. R & Ors* [2006] IEHC 221 (hereafter *R*) and the second High Court judgment was *MR v. TR & Ors* [2006] IEHC 359 (hereafter *MR*).
2. Article 40.3.3 of the Irish Constitution.
3. See the recent decision in *A, B and C v Ireland* [2010] ECHR 2032.
4. There is no specific policy on assisted reproduction, although this was the subject of a government-appointed commission that published policy recommendations in 2005, a year before the *MR v TR* case came before the High Court. See the discussion of the regulative context, including the medical guidelines and the recommendations of the Commission on Assisted Human Reproduction in the section: Lack of Regulation in Ireland.
5. As per Hardiman J. in *Roche*; see note 1.
6. This is one of nine fertility treatment centers operational in the Republic of Ireland. None of these centers have any specific regulation. Fertility clinics are regulated by the EU Tissue and Cells Directive and Irish Medical Council Guidelines.
7. See note 1, *R*.
8. See note 1, *R*.

9. In his judgment on several occasions McGovern J. quotes Munby J. in *The Queen on the application of Smeaton v. Secretary of State for Health* [2002] 2 FLR 146 with approval.
10. Brazier M. Hard cases make bad law? *Journal of Medical Ethics* 1997;23:341–3 at p. 341.
11. It is worth noting that the relationship between natural law and the constitution when the two conflict has been considered in *Re Article 26 and the Regulation of Information (Services Outside of the State Termination of Pregnancies Bill, 1995* [1995] 3 IR 62 at 81. In this case it was decided that in cases of conflict natural law could not be understood as being superior to constitutional law; see the critique of this decision by Whyte GF. Natural Law and the Constitution. *Irish Law Times* 1996; Jan:8–12. For a discussion of natural law and *Roche*, see Binchy W. Article 40.3.30 of the Constitution: Respecting the Dignity and Equal Worth of Human Beings. In: Schweppe J, ed. *The Unborn Child, Article 40.3.3° and Abortion in Ireland: Twenty Five Years of Protection?* Dublin: Liffey Press; 2008. For a more general account of the contested place of natural law in the Irish Constitution, see Lewis VB. Natural law in Irish constitutional jurisprudence. *Catholic Social Science Review* 1997;2:171–82 at p. 173.
12. Offences against the Person Act 1861, ss 58 and 59 of which made abortion a criminal offense carrying a maximum sentence of life in prison (for both the woman and anyone who helps to procure the abortion). The provisions of this Act are affirmed in the Health (Family Planning) Act 1979.
13. Hogan G. Legal aspects of church/state relations in Ireland. *St. Louis University Public Law Review* 1988;7:275–86 at pp. 285–6.
14. *Attorney General v. X.* [1992] 1 I.R. 1.
15. For an interesting discussion of this case, see Fox M, Murphy T. Irish abortion: Seeking refuge in a jurisprudence of doubt and delegation. *Journal of Law and Society* 1992;19:454–66.
16. See note 13, as per Hederman J. at 121.
17. See note 13.
18. McGovern J. gained further support for this proposition from *Baby O. v. The Minister for Justice*. The following statements were made in the judgment of that case: “[A]s explained by the judgments of the majority in this Court in *Attorney General v. X.* [1992] 1 I.R. 1, [Article 40.3.3] was intended to prevent the legalisation of abortion either by legislation or judicial decision within the State, except where there was a real and substantial risk to the life of the mother which could only be avoided by the termination of the pregnancy.” “The enactment of Article 40, s.3, sub-s.3, in 1983 did not I believe bring about any fundamental change in our law. Already, s.58 of the Offences Against the Person Act, 1861, made it an offence unlawfully to bring about the miscarriage of a woman.”
19. It is worth pointing out that 40.3.3 was introduced in 1983. Assisted reproductive technologies have been available in Ireland since the 1980s, and it was in 1987 that the first “test tube” baby was born.
20. Whyte G. High Court had to determine what word unborn meant. *The Irish Times* 2006 Dec 16; An Bille um an Ochtú Leasú ar an mBunreacht, 1982: An Tuarascáil (Atógáil). Eighth Amendment of the Constitution Bill, 1982: Report Stage; available at <http://www.oireachtas-debates.gov.ie/S/0100/S.0100.198305250006.html> (last accessed 16 Nov 2010). The inclusion of the following words “which shall not include the fertilised ovum prior to the time at which such fertilised ovum becomes implanted in the wall of the uterus” in the eighth amendment was defeated by 18 votes to 10.
21. The wording of the proposed amendment was as follows: “It shall be unlawful to terminate the life of an unborn unless such termination is necessary to save the life, as distinct from the health, of the mother where there is an illness or disorder of the mother giving rise to a real and substantial risk to her life, not being a risk of self-destruction.” This would have had the effect of further restricting women’s ability to obtain a legal abortion in the state. See Weinstein J. “An Irish Solution to an Irish Problem”: Ireland’s struggle with abortion law. *Arizona Journal of International and Comparative Law* 1993;10:165–200.
22. Casey G. Born Alive: The Legal Status of the Unborn Child in England and the U.S.A. *Chichester: Barry Rose*; 2005:40.
23. *Report of The Commission on Assisted Human Reproduction*. Dublin: Department of Health and Children; 2005.
24. See note 22, *Report* 2005.
25. Medical Council. *Guide to Ethical Conduct and Behaviour*, 4th ed. Dublin: Medical Council; 2004.
26. Medical Council. *Guide to Professional Conduct and Ethics for Registered Medical Practitioners*, 7th ed. Dublin: Medical Council; 2009.

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27. *Ethical, Scientific and Legal Issues Concerning Stem Cell Research. Opinion*. Dublin: The Irish Council for Bioethics; 2008:41.
28. Similar criticism in relation to abortion regulation was raised by McCarthy J. in the *X* case: “[T]he failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable. What are pregnant women to do? What are the parents of a pregnant girl under age to do? What are doctors to do?” as quoted in Fox and Murphy, see note 14, 1992:455.
29. See note 1, *MR*. See also *Roe v. Wade*, 410 U.S. 113, 159 (1973): “We need not resolve the difficult question of when life begins. When those trained in the respectable disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man’s knowledge, is not in a position to speculate of man’s knowledge, is not in a position to speculate as to the answer.”
30. Issues of constitutional interpretation and the standards the Courts used for deciding the original intention of Article 40.3.3 are worthy of a whole paper in themselves. We acknowledge that the courts use a number of principles of interpretation including “the mind of the people,” natural law, and parliamentary intention. However, we cannot for reasons of space and focus discuss the use of these principles with any critical depth here.
31. See note 1, *Roche* as per Murray CJ.
32. See Gough F. Ireland and the frozen embryo: A slight thawing? *Medical Law Review* 2010;18:239–47.
33. See note 13, as per McCarthy CJ.
34. See note 1, *Roche* as per Fennelly J.
35. See, for example, the Irish Council for Civil Liberties policy document on abortion legislation, *The Need for Abortion Law Reform in Ireland: The Case Against the Twenty-Fifth Amendment of the Constitution Bill, 2001*. Dublin: ICCL; 2002:¶21.
36. Regarding the ambiguity of Article 40.3.3, see All-Party Oireachtas Committee on the Constitution. *Report of the Constitution Review Group*. Dublin: Stationery Office; 1996. See also All-Party Oireachtas Committee on the Constitution. *Fifth Progress Report: Abortion*. Dublin: Stationery Office; 2000; both available at <http://www.constitution.ie/publications/default.asp?UserLang=EN>. (last accessed 30 Oct 2010). On AHR, see the above-mentioned CAHR Report, note 26, CAHR 2005.
37. See note 1, *R* as per McGovern J.
38. Civil Liability Act 1961, s.58.
39. See note 1, *Roche* as per Denham J. at 59 & 65.
40. This echoes the views of the Warnock Report, *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd.9314) London: HMSO; 1984.
41. See note 1, *Roche* as per Murray CJ.
42. Bortolotti L. Disputes over moral status: Philosophy and science in the future of bioethics. *Health Care Analysis* 2007;15:153–8.
43. Ruling on Frozen Embryos. *The Irish Times* 2006 Nov 20.
44. See note 42, Ruling 2006.
45. Szawarski Z. Talking about embryos. In: Evans D, ed. *Conceiving the Embryo: Ethics, Law, and Practice in Human Embryology*. The Hague: Nijhoff; 1996:119–23.
46. We have not the space to fully explore the importance of potentiality in relation to capacity and Article 40.3.3 here. The type of potentiality discussed here is called “natural potentiality.” DeGrazia describes it as follows: “Natural potentiality is understood as the potential encoded in, and expressive of, one’s nature or kind. It is contrasted with extrinsic potential such as my potential to be Governor of Maryland or a rock’s potential to be a paperweight.” See DeGrazia D. Must we have full moral status throughout our existence: A response to Alfonso Gómez-Lobo. *Kennedy Institute of Ethics Journal* 2007;17(4):297–310 at p. 303.
47. Warren MA. *Moral Status: Obligations to Persons and Other Living Things*. Oxford: Oxford University Press; 1997:13–4.
48. See note 41, Bortolotti 2007.
49. This point has been made in policy documents on AHR elsewhere; for example, in the Warnock Report it was stated: “Although the questions of when life or personhood begin appear to be questions of fact susceptible of straightforward answers, we hold that the answers to such questions in fact are complex amalgams of factual and moral judgements”; see note 37, Warnock Report, 1984:60.
50. Berg J. Of elephants and embryos: A proposed framework for legal personhood. *Hastings Law Journal* 2007;59:369–406.

51. Finnis J. The priority of persons. In: Horder J, ed. *Oxford Essays in Jurisprudence*. Oxford: Oxford University Press; 2000:8; see also Finnis J. *The Other F Word*; 2010; available at <http://www.thepublicdiscourse.com/2010/10/1849> (last accessed 16 Nov 2010).
52. See note 50, Finnis 2008:10.
53. For a discussion of the problems of needing an account of moral status before legal protections can be decided on, see Alto CR. The hunting of the snark: The moral status of embryos, right-to-lifers, and third world women. *Stanford Law & Policy Review* 1994;6(2):11–37.
54. We recognize that this connection to the “maternal organism” gives rise to the capacity to be born, but that in no way gives it the separate capacity to be born alive. Many thanks to Ruth Fletcher for drawing our attention to this distinction.